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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

DAVID F. DUNBAR et al. as Trustees, etc.,

Plaintiffs and Respondents,

v.

STEPHEN G. WILLIS,

Defendant and Appellant.

D054146

(Super. Ct. No. P191122)

ORDER MODIFYING OPINION
AND DENYING PETITION FOR
REHEARING

[CHANGE IN JUDGMENT]

THE COURT:

The petition for rehearing is denied.

It is ordered that the opinion filed January 28, 2010, be modified as follows:

1. On page 1, following the word "Affirmed," the following text is added:
"and remanded with directions," so the sentence reads: "Affirmed, and remanded with directions."
2. On page 24, footnote 9 is deleted.
3. On page 24, after the first paragraph, the following text is added:

In the interest of judicial economy, we address one final issue. While this appeal was pending, our court requested supplemental briefing to clarify whether the Trustees conceded that the judgment did not permit them to transfer Membership Interests (with voting rights) to any of the Gift Beneficiaries who were not permitted transferees under Section 7.4 of the Operating Agreement. In response, the Trustees conceded this action was not permitted. In light of this concession and the fact that the concession is consistent with the Referee's ruling, our analysis was based on a review of the judgment that permitted unlimited transfers only of Economic Interests, rather than transfers of full Membership Interests.

In a petition for rehearing, Stephen argues that the Trustee's concession is not reflected in the final judgment, and thus the final judgment could be read as permitting the Trustees to transfer Membership Interests to all Gift Beneficiaries without restriction. The argument is untimely because Stephen could have raised the issue below in response to the Trustee's concession. However, because we agree with Stephen's observation that a potential ambiguity exists, we shall remand and direct the court to clarify the wording of Paragraph 3 of the final judgment to reflect that the judgment authorizes unlimited transfers to the challenged Gift Beneficiaries only of Economic Interests. On remand, the court shall have no authority to modify or reconsider its prior attorney fee and costs order. Stephen's arguments in this regard are untimely and thus waived.

4. Following the heading "DISPOSITION," the text is deleted in its entirety and the following text is added:

We remand for the sole and limited purpose for the court to modify the wording of Paragraph 3 of the final judgment to conform to the Trustees' concession and the Referee's intent that the authorized transfers pertain only to the transfer of Economic Interests, and not full Membership Interests. In all other respects, we affirm the judgment. Appellant to bear respondents' costs on appeal.

This modification changes the judgment.

HALLER, Acting P. J.

Copies to: All counsel